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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 166

MAY RYAN, Executrix of the Will and Estate of Thomas Ryan, Deceased,
Petitioner,

VERSUS

ACHE C. ALEXANDER, Formerly Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Proposition One: The taxpayer was not estopped to claim a refund of tax overpaid for 1924 as the result of the erroneous inclusion in income on his return for that year of certain items of income which belonged in the year 1925 on the ground that the assessment of additional tax upon such items for 1925 was barred by limitation when he filed his claim for refund 31

Proposition Two: The taxpayer was entitled to have his allowance for depletion on the oil production and bonuses for leases received from his land in 1924 computed on the discovery value thereof resulting from the Hully Sands offset well, part of the cost of which he paid for the purpose of dis-

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covering oil on his land and by which he did discover oil on it 39

Proposition Three: The assessment and collection in 1925 of a deficiency in the taxpayer's tax for 1924 was illegal and void in its entirety because made while his appeal from the determination of such deficiency was pending before the Board of Tax Appeals, or, if his appeal to the Board was void, then because made after the assessment and collection of such deficiency was barred by limitation 50

Proposition Four: If by depositing $36,500 with the collector to be held in a special fund without assessment the taxpayer waived the statutory restrictions on assessment of that sum while his appeal was pending before the Board of Tax Appeals, still the assessment of the additional sum of $9,135.73 and the collection thereof by distraint was an illegal and void assessment and collection, because made while his appeal was pending before the Board, or, in event that appeal was a nullity, then because made after the assessment and collection thereof was barred by limitation 55

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This case was begun in the District Court of the United States for the Western District of Oklahoma by Thomas Ryan as plaintiff, but thereafter he died and his executrix, the petitioner here, was duly substituted as plaintiff for him. For convenience he will be referred to herein by name or as plaintiff or as the taxpayer. All italics are ours unless

otherwise indicated. Plaintiff sought to recover income taxes alleged to have been erroneously and illegally collected and paid for the year 1924.

The Pleadings

The petition as amended alleges grounds of jurisdiction and the office of the defendant as a former collector of internal revenue; that the taxpayer in apt time filed his income tax return for the calendar year 1924 and paid the amount of tax shown to be due thereon in the sum of $25,731.12; that thereafter the Commissioner determined a deficiency in his income tax for that year of $36,500 and on November 23, 1929, assessed that amount of tax and the further amount of $9,135.73 of interest thereon, making a total of $45,635.73 of tax and interest so assessed, and the plaintiff paid this amount to the defendant as collector; that this sum was erroneously, wrongfully and illegally assessed, collected and received by him and thereafter in apt time the plaintiff filed with the Commissioner a claim for refund of it based on the same grounds as those set forth in his petition for a recovery, and thereafter filed an amended claim and a second amended claim upon the same grounds, but amplified and supported by argument and authorities; that thereafter the Commissioner allowed the claim for refund in the sum of $6,065.27 of tax and $1,518.10 of interest as admittedly overassessed and overpaid, but rejected it for the balance of the amount claimed; and that the assessment and collection of the alleged deficiency in tax and interest was erroneous, wrongful and illegal for the following reasons:

(1) The taxpayer's books and accounts were kept and his returns for 1924 and all other years were made on a cash receipts and disbursements basis and income in the sum of $40,000 on account of an in-oil payment was erroneously included on his return for 1924 when in fact he received only $8,391.69 of said sum in that year and did not receive the remainder thereof, $31,608.31 in amount, until in 1925, and also other income in the sum of $22,565.33 [the proof showed this to be $16,119.22] on account of oil produced and run from his property in December, 1924, was erroneously included on his return for that year when in fact he did not receive that sum until in 1925.

(2) The Commissioner refused to allow him the deduction from gross income of a reasonable allowance for depletion, based on the correct discovery value of his land for oil, upon bonuses received by him for oil and gas leases and royalties.

(3) The taxpayer, upon receiving the Commissioner's notice of the determination of a deficiency filed an appeal therefrom to the Board of Tax Appeals, and while such appeal was pending and undetermined, the Commissioner assessed and collected from the taxpayer said entire sum of $36,500 tax and $9,135.76 interest, contrary to the provisions of the statute which prohibited him from making any assessment of a deficiency while an appeal from the determination of such deficiency was pending before the Board, or if the appeal to the Board was void, then after the assessment of any deficiency was barred by limitation, and, therefore, said assessment was illegal and void in its

entirety and the collection thereof was illegal and void (R. 9-13, 17, 165, 176).

In his answer the defendant admits the jurisdictional matter and his official position as former collector of internal revenue, the payment to him as collector of the stated amount of deficiency in tax and interest, the filing of the claims for refund on the grounds stated, the allowance of a partial refund of the amount claimed and the rejection of the claim as to the remainder, but denies that the amount of tax and interest not refunded was erroneously or illegally assessed, collected and paid.

For further defense the defendant avers that the plaintiff included in income on his return for the year 1924 the sums of $31,608.31 and $22,565.35 which he now alleges were not received until the succeeding year; that the Commissioner relied on the statements made in plaintiff's return in computing and assessing his tax for 1924; that plaintiff did not assert that the items so received in 1925 were not properly income to him in 1924 until the time limited by statute for the assessment of additional taxes for 1925 had run; and that by reason thereof he is now estopped to assert that any of the items of income so shown on his return for 1924 were not in fact received in that year (R. 13-15, 18).

To defendant's answer plaintiff replied by general denial of all new matter (R. 15-16).

From the pleadings it appears that the issues are:

(1) Whether the plaintiff was estopped to show the

fact, and to recover a refund based on the fact, if shown, that items included in income on his return for 1924 were not in fact received by him until the succeeding year.

(2) Whether his allowance for depletion should be computed on a discovery value of his land for oil prior to the sale of leases thereon and depletion allowed on bonuses received for leases as advanced royalties.

(3) Whether the assessment by the Commissioner and collection by the defendant of an alleged deficiency in tax and interest against him while his appeal from the Commissioner's determination of such proposed deficiency was pending before the Board of Tax Appeals, or if his appeal to the Board was void, then after the assessment of any deficiency was barred by limitation, was an illegal and void assessment and collection of such tax and interest.

The Facts

The facts as established by the pleadings and evidence are as follows:

Thomas Ryan in 1924 and for many years before lived at Wetumka, Oklahoma. He acquired title from various sources many years prior to 1924 to the North Half and the Northwest Quarter of the Southeast Quarter of Section Two, in Township Nine North, Range Nine East, in Hughes County, Oklahoma. The portions of this tract acquired prior to March 1, 1913, had no oil or mineral value when acquired or at March 1, 1913, and the portions acquired after March 1, 1913, had no oil or mineral value when acquired.

Therefore, he had no cost in the oil or mineral value in that land (R. 62).

Prior to 1923 he had executed an oil and gas lease covering the West Half and the Southeast Quarter of the Northwest Quarter of said Section Two which lease was owned throughout 1923 and 1924 by Wittmer Property Trustees, a business trust having its home office at Pittsburgh, Pennsylvania. On December 17, 1923, he executed an oil and gas lease on the Northeast Quarter of the Northwest Quarter of said Section Two to O. F. Cashdollar (R. 188-192). This lease was executed both by lessor and lessee and contained the following provision:

> "This contract to be null and void unless a well is drilled to a depth of 3500 feet on SW¼ of SE¼ of section 35-10-9 Okfuskee County, Okla., unless oil is found in paying quantities at a lesser depth, said well to be completed by Nov. 15th, 1924, this lease (original) to be delivered when well is drilled to a depth of 3000' unless oil is found before" (R. 192).

The court judicially knows that SW¼ of SE¼ of Section 35-10-9 adjoins N½ of Section 2-9-9 on the north. The sole consideration to Ryan for the above lease was the drilling of the well as stipulated which would offset his land (R. 23).

By agreement between the lessor and the lessee the lease when executed was placed in escrow in the American National Bank of Wetumka, Oklahoma, under the provisions of a written escrow statement, signed by the cashier of that bank, that it was to be delivered to the lessee when an oil well was drilled to a depth of 3,000 feet on the

Southwest Quarter of the Southeast Quarter of Section Thirty-five Township Ten North, Range Nine East in Okfuskee County, Oklahoma, unless oil was found in paying quantities at a lesser depth (R. 24, 27). O. F. Cashdollar, lessee named in the lease, was the agent and representative of Wittmer Property Trustees in obtaining and handling leases for that trust in Oklahoma, and in entering into the above lease contract as lessee he was acting for and on behalf of and for the benefit of Wittmer Property Trustees (R. 24, 32). On March 29, 1924, Wittmer Property Trustees, then owning an oil and gas lease on the Northeast Quarter and the South Half of the Southeast Quarter of said Section Thirty-five, as well as on the West Half of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Two, and being the beneficial owner of the said lease from Ryan to Cashdollar then in escrow in the said American National Bank, entered into a contract with T. B. Slick whereby he agreed to drill a well in the Southwest Quarter of the Southeast Quarter of said Section Thirty-five, to and through the Papoose Sand found at approximately 3,500 feet, unless oil was found in paying quantities at a lesser depth, and to commence said well not later than April 16, 1924, and to complete it by September 1, 1924, and in consideration therefor was to receive an undivided half interest in the leases owned by Wittmer Property Trustees on the Northeast Quarter and the South Half of the Southeast Quarter of said Section Thirty-five and the West half of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of the said Section Two (R. 25, 32, 28-30).

Slick commenced the drilling of the well within the time specified and completed it on August 16, 1924, for a producer having an initial production of 1,200 barrels per day (R. 193-194), which within a few days increased to as much as 3,000 barrels per day natural (R. 83, 87).

While the drilling of this well was in progress, and on June 28, 1924, the lease from Ryan to Cashdollar was by agreement delivered by the said American National Bank to the lessee (R. 26, 27).

The South Half of said Section Thirty-five was known as the Hully Sands allotment and the above-mentioned well was known as the Hully Sands #1 (R. 25, 33). Its location was 320 feet north of the south line and 320 east of the west line of the South Half of the Southeast Quarter of said Section Thirty-five (R. 194). This section adjoined said Section Two on the north and so the well was a direct offset to the Ryan land, and in its production of oil it would have the effect to drain oil from the Ryan land (R. 138).

The bringing in of that well had the effect to prove the Ryan land valuable for oil and gas production and to make it what among oil operators and in the oil producing business is termed a "proven area," and to render its fair market value materially disproportionate to its cost (R. 84, 88, 130-131, 138).

If Ryan had not given the lease on NE¼ of NW¼ of Section 2-9-9 through Cashdollar to Wittmer Property Trustees in consideration of the drilling of the Hully Sands

well, that well would not have been drilled at that time nor as an offset to Ryan's land (R. 26-27, 33).

Under date of March 29, 1924, Wittmer Property Trustees executed three assignments of oil and gas leases to Slick; one was of an undivided half interest in a lease on W½ of NW¼ and SE¼ of NW¼, Section 2-9-9; another was of an undivided half interest in a lease on NE¼, Section 35-10-9 (R. 40-42), and the other was of an undivided half interest in a lease on S½ of SE¼, Section 35-10-9 (R. 43-44).

These were all recorded on June 10, 1924. Under date of August 5, 1924, Wittmer Property Trustees through Cashdollar assigned to Slick an undivided half interest in the oil and gas lease given by Ryan on NE¼ of NW¼, Section 2-9-9, and the assignment was recorded August 13, 1924 (R. 34-35). These assignments fulfilled the contract of Wittmer Property Trustees with Slick.

Within thirty days after the Hully Sands well was brought in the Northeast Quarter of said Section Two had an oil and gas lease bonus value of $1,250 per acre and a value for the ⅛th royalty reserved to the lessor of $1,250 per acre, and the Northwest Quarter of the Southeast Quarter of said Section Two had an oil and gas lease bonus value of $625 an acre and an oil royalty value of $625 an acre (R. 84, 88).

On August 13, 1924, two days after the Hully Sands well came in, Ryan sold an oil and gas lease on the West Half of the Northeast Quarter of said Section Two to the Independent Oil & Gas Company for a bonus of $80,000.

This lease, in the usual form of oil and gas leases in the Mid-Continent field, provided for the payment of 1/8th royalty to the lessor and carried a 7/8ths working interest to the lessee (R. 85, 99, 131, 152, 194-199).

On September 18, 1924, 33 days after the Hully Sands well was brought in, Ryan sold a similar lease on the East Half of the Northeast Quarter of said Section Two to the Independent Oil & Gas Company for a bonus of $100,000, of which $60,000 was paid in cash and notes equivalent to cash, and $40,000 was to be paid out of 1/2 of the first oil produced from the leased premises (R. 85, 99-100, 152, 130, 199-205).

On September 24, 1924, 39 days after the Hully Sands well was brought in, Ryan sold a similar oil and gas lease on the Northwest Quarter of the Southeast Quarter of said Section Two to Skelly Oil Company for a cash bonus of $20,000 (R. 100, 131, 152, 206-208).

For services in the selling of these leases Ryan paid a broker's commission of 5%, or $10,000, on the gross bonus price of $200,000 (R. 118).

Immediately upon the execution of these leases the drilling of wells on the leased premises was commenced and at the end of 1924 five producing wells had been brought in on Ryan's land and others were drilling (R. 213).

On March 16, 1925, March 15 being Sunday, Ryan filed with the defendant, then Collector of Internal Revenue for the District of Oklahoma, his income tax return for

the year 1924 on which he reported oil and gas royalties received in the sum of $43,254.33, and reported the $190,000 net bonuses received from the sale of oil and gas leases (inadvertently including the full amount of the $40,000 in-oil payment as actually received) as gain on the sale of capital assets held more than two years. He also reported interest received and net income from business totalling somewhat less than $10,000, but none of this is involved here. His tax liability as computed on his return was $25,731.12, which he paid in due course (R. 182, 147-149).

In 1923 he employed Tom F. Carey, a certified public accountant, to prepare his income tax return for the year 1922. This employment was continued for all years to and including 1937, except that Carey did not prepare his return for 1923 (R. 63, 119). Carey represented Ryan before the Treasury Department in respect of his income tax liability for 1924 at all times herein mentioned. Ryan's business was primarily farming and dealing in land (R. 64) and he did not keep any complete books of account or records of his business, and the most complete record he had was his bank account. Such accounts and records as he had were kept on a cash receipts and disbursements basis and his returns for 1922 and subsequent years were made on that basis (R. 119).

Shortly after the filing of Ryan's return for 1924 and on April 15, 1925, Carey wrote the defendant as Collector a letter in which he pointed out that the bonuses from the sale of the three oil and gas leases had been reported

on the return as capital net gain from the sale of assets held for more than two years and requested that the return be reviewed at the earliest possible date and a specific ruling made on the question of its correctness in that respect (R. 64, 153). On April 21, 1925, an amended return was made for the taxpayer after an examination into his tax liability, by Harry A. Sproles, a deputy collector in the office of the defendant, in which he set up the oil and gas lease bonuses as ordinary income and also made other revisions of the original return not material here, and determined a deficiency in Ryan's tax of $47,623.49. On this return no deduction for depletion on the lease bonuses was allowed (R. 65, 150-152). Ryan refused to sign this return, and protested the additional tax (R. 66).

Included by inadvertence and mistake in the $200,000 of the oil lease bonuses on Ryan's original return was the entire $40,000 in-oil payment provided for as lease bonus, notwithstanding only $8,381.69 of that payment was actually received in 1924 (R. 101, 103), leaving $31,608.31 of the $40,000 received in 1925 and erroneously included in income in 1924.

Also included by inadvertence and mistake in the $43,254.33 of oil royalties reported on Ryan's original return were certain payments totalling $16,119.22 for royalty oil produced in December, 1924, but not received until in January, 1925 (R. 90-91, 105-106).

In April, 1925, while deputy collector Sproles was engaged in preparing the amended return referred to, Carey told him that payments for certain oil runs of De-

cember, 1924, which were included in income on the taxpayer's return for 1924, were not actually received until in January, 1925 (R. 111, 117). This was Carey's testimony and Sproles, testifying for the defendant, did not deny it, but merely said he did not recall such a statement from Carey (R. 142, 144). Sproles made no change on the amended return in the income from lease bonuses and royalties shown on the original return filed by the taxpayer (R. 68, 150-152). He testified that before he made the amended return he *"had already made an examination of the Hughes County records, and had information in regard to these leases and royalty items"* (R. 144).

Again in the early part of 1928 when Revenue Agent V. V. Hardcastle was investigating Ryan's return and income tax liability for 1925, Carey called that examining officer's attention to the fact that payments for certain oil runs for December, 1924, were included in income on the taxpayer's return for that year, though not actually received until in 1925 (R. 117). The defendant did not call Hardcastle as a witness.

After various conferences between Carey, representing the taxpayer, and conferees representing the Bureau of Internal Revenue (R. 66), and the preparation and filing by Carey for the taxpayer of a depletion report based on discovery values claimed on Ryan's property after production was actually brought in on that property, such depletion report being termed a Form O (R. 215-217), the Commissioner sent a notice of deficiency under the provisions of Section 274 of the Revenue Act of 1926, advising

the taxpayer of the determination of a deficiency in his income tax for 1924 of $36,743.62, as well as a deficiency for each of the years 1925 and 1926, and further advising him of his right to petition the Board of Tax Appeals within sixty days from the date of that letter for the redetermination of his tax liability (R. 153-160). This notice of deficiency was dated December 26, 1928, and was sent by registered mail addressed to Mr. Thomas Ryan, c/o Tom F. Carey, Braniff Building, Oklahoma City, Oklahoma. For some reason not disclosed, the letter was returned undelivered. The Commissioner thereupon sent the letter to the defendant as Collector of Internal Revenue at Oklahoma City, Oklahoma, with directions to make delivery of it, and on January 15, 1929, the defendant re-mailed the letter by registered mail addressed to Mr. Thomas Ryan, c/o Tom F. Carey, 709 Braniff Building, Oklahoma City, Oklahoma, and on January 16, 1929, it was received by Carey (R. 69-70).

Thereafter Ryan filed his petition with the Board of Tax Appeals for a review of the determination of the deficiency for 1924 as set forth in the Commissioner's deficiency letter. The deficiencies as therein set forth for the years 1925 and 1926 were paid. Ryan's petition for review was received and filed with the Board under Docket No. 43126 on March 11, 1929 (R. 160). In due time the Commissioner filed his answer in the case, and thereafter Ryan filed an amended petition and the Commissioner filed his answer to the amended petition (R. 70-71).

The issues in the case having been duly made up, it was

assigned for trial at a field session of the Board held in Oklahoma City, Oklahoma, in September, 1932. When called for trial *the Commissioner moved to dismiss the proceeding for want of jurisdiction in the Board* on the ground that the notice of deficiency was dated December 26, 1928, and the petition for review was not filed with the Board until March 11, 1929, and hence was not filed within sixty days of the time of the mailing of the notice as required by law. Evidence was heard on this motion and the petitioner by his attorney confessed it. Thereupon on September 26, 1932, the Board sustained and granted the motion and dismissed the proceeding and the petitioner's petition for review for lack of jurisdiction (R. 160-161).

After Ryan's petition for review had been filed with the Board and the above proceeding instituted thereby, and while it was pending and shortly prior to October 2, 1929, Carey, as agent and representative of the taxpayer, had various conversations with P. G. Rawdon, assistant to the Collector and executive head of the Collector's office, in respect to the payment of the proposed deficiency to the Collector to be held in an unidentified fund account, but without any assessment of such deficiency, pending the determination of the case before the Board of Tax Appeals, and thereby stopping and avoiding the accumulation of interest on the amount of the deficiency at the rate of 6% per annum in event it should be finally determined that the taxpayer was liable for that amount in tax. Rawdon advised Carey that he could make the payment of the amount without an assessment thereof and that the money so paid would be placed in the Collector's unidentified fund account and re-

main there without assessment until a final determination of the proceeding before the Board of Tax Appeals and then would be applied in satisfaction of any tax liability that might be determined and assessed against the taxpayer, and that such payment would stop the accumulation of interest on the amount so paid, and that if no tax liability was determined against the taxpayer, such sum so deposited would be refunded to him (R. 72-73, 77-78).

Following such conversations and on October 2, 1929, Carey deposited for the taxpayer with the defendant herein as Collector $36,500 (R. 72, 161) to be held by him in his unidentified fund account until the case in the Board of Tax Appeals was disposed of, and then applied against additional tax for 1924, if any was adjudged (R. 161).

Thereafter on November 23, 1929, the Commissioner assessed against the taxpayer $43,635.73 additional tax and interest for 1924 (R. 96).

On November 29, 1929, the defendant as Collector issued to the taxpayer a notice that the above amount of tax and interest had been assessed against him and a demand for the payment of $9,135.73 under penalty of interest thereon after ten days at the rate of 1% per month and of collection with costs by seizure and sale of property (R. 73, 162-163).

On December 9, 1929, Carey wrote the Commissioner a letter protesting against the assessment of the tax and interest (R. 73-74). After referring to the case pending before the Board of Tax Appeals Carey said:

"The taxpayer in this instance has not waived and does not waive any of the provisions prohibiting assessment and collection while the case is pending for final determination before the Board of its decision therein."

And also:

"We respectfully protest the assessment of this tax as illegal and unwarranted * * * and protest also as illegal and unwarranted any procedure to collect the same until the Board's decision in this case has become final" (R. 163-164).

On December 10, 1929, the defendant as Collector issued Distraint Warrant No. 20583 against the taxpayer for the collection of $9,135.73 of the amount of tax and interest assessed on November 23, 1929. This distraint warrant was served on Carey as agent and representative of the taxpayer on December 11, 1929 (R. 74-75), and on December 12, 1929, he paid the amount called for under written protest and said:

"Protest is made on the ground that the assessment is erroneous and illegal, and payment is made under duress solely to prevent the imposition of penalties threatened and the attachment and seizure of property" (R. 165).

On December 19, 1929, the Commission replied to Carey's letter of December 9, 1929, and said that the assessment of $36,500 on November 23, 1929, was made "to clear the Collector's records," and that the assessment would not jeopardize the taxpayer's appeal to the Board, and further that:

"Since you indicate that the Collector is endeavoring to collect the full amount of the assessment in the

amount of $45,635.73, the matter is being taken up with that official" (R. 112-113).

Thereafter on April 7, 1933, Ryan filed with the Commissioner his claim for refund of the full amount of the $45,635.73 tax assessed and paid in 1929. This claim was made out on Form 843 prescribed by the Treasury Department for claims for refund and set forth all of the grounds for refund alleged in the plaintiff's petition herein as well as others (R. 75-76, 165-176).

Upon the filing of this claim an investigation of the taxpayer's income tax liability for the year 1924 was made by a revenue agent and upon that investigation, after various conferences and some correspondence with Carey representing the taxpayer, a refund of $6,065.27 of tax was allowed (R. 97-98, 183-186). Part of this tax and accrued interest was duly paid the taxpayer and part was applied as a credit against an asserted tax liability for another year (R. 187-188).

Thereupon the plaintiff brought the instant suit to recover the balance of tax and interest assessed and collected in 1929 in the sum of $38,052.36.

The parties having waived a jury trial by written stipulation filed in the case, the trial court made findings of fact and therein found specially and generally for the defendant (R. 48-53, 54), and also found for him on all the issues of law (R. 53-54), and judgment for the defendant was rendered accordingly (R. 54-55). The Circuit Court of Appeals affirmed the judgment of the trial court in all respects (R. 219-229).

II.

JURISDICTION

1. The date of the judgment of the Circuit Court of Appeals to be reviewed is March 18, 1941 (R. 229). The opinion of the Court was handed down on the same day (R. 219-229).

2. The statutory provision under which the jurisdiction of this Court is invoked and which is believed to sustain its jurisdiction is Section 347(a) of Title 28 of the United States Code, being Section 240 of the Judicial Code, as amended.

3. The decision of the court below is in conflict with the decisions of various Circuit Courts of Appeals and of this Court and decides an important question of Federal law which has not been, but should be, settled by this Court. This Court entertains jurisdiction to grant writs of certiorari in similar cases at every term, and there can be no need to list any of the great array of cases in which its jurisdiction is so exercised.

4. The petition for the writ is presented under Rule 38, paragraph 5(b), of the Revised Rules of this Court adopted February 13, 1939, and effective February 27, 1939.

III.

QUESTIONS PRESENTED

The questions presented on this petition may be stated generally as follows:

1. Is the taxpayer estopped to claim a refund of tax overpaid for 1924 as the result of the erroneous inclusion in income on his return for that year, which was made on a cash receipts and disbursements basis, of certain items of income which were not received until in 1925, on the ground that the assessment of additional tax upon such items for 1925 was barred by limitation when he filed his claim for refund?

2. Was the taxpayer entitled to have his allowance for depletion on the oil production and bonuses for leases received from his land in 1924 computed on the discovery value thereof resulting from the Hully Sands offset well, a part of the cost of which he paid in order to test and prove his land for oil and which did discover oil on his land?

3. Was the assessment and collection in 1929 of a deficiency in the taxpayer's tax for 1924 illegal and void in whole or in part because made while his appeal from the determination of such deficiency was docketed and pending before the Board of Tax Appeals and, therefore, in direct contravention of the express prohibition of the statute, or, if his appeal to the board was void, then because made after the assessment and collection of such deficiency was barred by limitation?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The petitioner relies on the following reasons for the allowance of a writ of certiorari:

1. The Circuit Court of Appeals, in deciding that the inclusion by mistake of the taxpayer in income in 1924 of items not received until 1925 was sufficient to sustain the defense of estoppel pleaded by the defendant, notwithstanding that the taxpayer's returns for all years were made on a cash receipts and disbursements basis and his returns for 1924 and 1925 were audited by the Commissioner and additional tax assessed against him for each year and that the additional tax assessed for 1924 was based upon a return prepared by a deputy of the defendant and which the taxpayer refused to sign, has rendered a decision in conflict with the decisions of the Circuit Court of Appeals of the Second Circuit in *Helvering* v. *Brooklyn City R. Co.*, 72 Fed. (2d) 274; *Salvage* v. *Commissioner*, 76 Fed. (2d) 112, and *Commissioner* v. *Union Pac. R. Co.*, 86 Fed. (2d) 637, and with the decision of the Circuit Court of Appeals of the Fourth Circuit in *Hull* v. *Commissioner*, 87 Fed. (2d) 260, and with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Crossett Lumber Co.* v. *United States*, 87 Fed. (2d) 930, and with the decision of the Circuit Court of Appeals of the Ninth Circuit in *Van Antwerp* v. *United States*, 92 Fed. (2d) 871, and with the decision of the Court of Appeals of the District of Columbia in *Louis Werner Saw Mill Co.* v. *Helvering*, 96 Fed. (2d) 539, and with the deci-

sions of this Court in *Helvering* v. *Salvage*, 297 U. S. 106, and *McEachern* v. *Rose*, 302 U. S. 56, upon the same matter.

2. The Circuit Court of Appeals, in deciding that the taxpayer, notwithstanding he contributed to the cost of drilling an offset well to his land for the purpose of discovering oil on it and proving it for oil production and by such well did discover oil on it and prove it for oil production, was not entitled to have his allowance for depletion upon his oil income from his land in 1924 computed on the basis of its value resulting from the discovery of oil thereon through such offset well, has rendered a decision in conflict with Sections 214(a) (9) and 204(c) of the Revenue Act of 1924, being the Act applicable to the year here involved, and Articles 201 to 228 of Regulations 65, being the Treasury Regulations promulgated under the Rev. Act of 1924, and Treasury Decision 3938, Cumulative Bulletin V-2 117; General Counsel's Memorandum 11385, Cumulative Bulletin XIII-1 64; Income Tax Unit 2361, Cumulative Bulletin VI-1 73, and with the decision of this Court in *Herring* v. *Commissioner*, 293 U. S. 322, and, insofar as the question is not controlled by the foregoing authorities, has rendered a decision upon an important question of Federal law which has not been, but should be, settled by this Court on the precise state of facts here presented.

3. The Circuit Court of Appeals in deciding that, because the taxpayer's appeal to the Board of Tax Appeals was not filed and docketed within sixty days after the date of the first notice of deficiency mailed to him but returned undelivered and the board thereafter dismissed his petition for want of jurisdiction on the ground that the appeal was

not timely filed, such proceeding before the board was a nullity and did not have the effect to suspend the power of the Commissioner to make an assessment of tax while it was pending nor suspend the running of the statute of limitations on the assessment of tax, has rendered a decision in direct conflict with the statutory provisions of Section 274 of the Revenue Act of 1924, Section 274(a) of the Revenue Act of 1926, and Sections 272(a) and 504 of the Revenue Act of 1928, and with the decision of the Circuit Court of Appeals for the Second Circuit in *American Equitable Assurance Co.* v. *Helvering*, 68 Fed. (2d) 46, and with the decisions of the United States Board of Tax Appeals in *USL Battery Corp.*, 32 B. T. A. 810, 812; *Puget Sound National Bank of Tacoma*, 36 B. T. A. 386, 390, and *Marie Minor Sanborn*, 39 B. T. A. 721, 725.

4. The Circuit Court of Appeals, in deciding that the assessment of a deficiency in tax for 1924 by the Commissioner in November, 1929, while an appeal by the taxpayer from the determination of such deficiency was docketed and pending before the Board of Tax Appeals was not illegal and void, but merely premature and irregular, has rendered a decision in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *American Equitable Insurance Co.* v. *Helvering*, 68 Fed. (2d) 46, and with the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Yellow Cab Co.*, 90 Fed. (2d) 699, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Ventura Consolidated Oil Fields* v. *Rogan*, 86 Fed. (2d) 149, and with the decisions of the District Court of the United States for the District of Maryland

in *United States* v. *Barber*, 24 Fed. Supp. 229, and *United States* v. *Barber*, 25 Fed. Supp. 197, and with the decisions of this Court in *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346, and *United States* v. *Continental National Bank & Trust Co.*, 305 U. S. 398.

5. The Circuit Court of Appeals, in deciding that the docketing by the taxpayer of a proceeding before the United States Board of Tax Appeals with respect to the proposed deficiency in tax for 1924, which was later dismissed by the board for lack of jurisdiction, was a nullity and did not have the effect to suspend the power of the Commissioner to assess the deficiency while such proceeding was pending nor to suspend the running of the statute of limitations, and that the assessment of the deficiency by the Commissioner in November, 1929, was valid and the tax paid on such assessment could not be recovered, notwithstanding such assessment was barred by limitation when made, has rendered a decision in conflict with Section 607 of the Revenue Act of 1928, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Welch* v. *Schweitzer*, 106 Fed. (2d) 885, and with the decisions of this Court in *McEachern* v. *Rose*, 302 U. S. 56, and *United States* v. *Continental National Bank & Trust Co.*, 305 U. S. 398.

6. The question whether Sections 272(a) and 504 of the Revenue Act of 1928 and similar provisions in all subsequent Revenue Acts are mandatory or whether, notwithstanding such statutory provisions, the Commissioner may assess and collect a deficiency in tax after a proceeding in respect of such deficiency has been placed on the docket of

the Board of Tax Appeals and while there pending undetermined and such assessment and collection of tax be deemed not void, but merely irregular and at most premature, in event it is eventually ruled that the taxpayer owed the tax, is an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in case No. 2192 in said Court entitled *May Ryan, Executrix of the Will and Estate of Thomas Ryan, Deceased, Appellant*, v. *Acel C. Alexander, Formerly Collector of Internal Revenue, Appellee*, to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States and that the judgment of said United States Circuit Court of Appeals in said case be reversed by this Court, and that petitioner have such further relief as to this Court may seem proper.

Dated at Oklahoma City, Oklahoma, this 9th day of June, 1941.

MAY RYAN,
Executrix of the Will and Estate, of Thomas Ryan, Deceased, Petitioner,

By CHAS. H. GARNETT,
608 Hales Building, Oklahoma City, Oklahoma,

Attorney for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1941

NO. .....

MAY RYAN, Executrix of the Will and Estate
of Thomas Ryan, Deceased,
Petitioner,

VERSUS

ACEL C. ALEXANDER, Formerly Collector
of Internal Revenue,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN SUPPORT OF PETITION

I.

DECISIONS IN COURTS BELOW

This case originated in the District Court of the United States for the Western District of Oklahoma. It is a law action triable by a jury, but trial by jury was waived in writing and a trial had to the court. The findings and decision of the trial court is not officially reported, but appears at pages 48 to 55 of the record.

The opinion of the Circuit Court of Appeals is reported in 118 Fed. (2d) 744.

II.
STATEMENT OF THE CASE

A statement of the case containing all that is material to the consideration of the questions presented with appropriate page references to the printed record has been made in the petition for the writ and such statement is hereby adopted and made a part of this brief.

III.
ASSIGNMENT OF ERRORS

The petitioner makes the following assignment of errors committed in the opinion and decision of the court below:

1. The Circuit Court of Appeals erred in holding that the taxpayer was estopped to claim a refund of tax overpaid for 1924 as the result of the erroneous inclusion in income on his return for that year of certain items of income which belonged in the year 1925 on the ground that the assessment of additional tax upon such items for 1925 was barred by limitation when he filed his claim for refund.

2. The Circuit Court of Appeals erred in holding that the taxpayer was not entitled to have an allowance for depletion on the oil production and bonuses for leases received from his land in 1924 computed on the discovery value thereof resulting from the Hully Sands offset well, part of the cost of which he paid for the purpose of discovering oil on his land and by which he did discover oil on it.

3. The Circuit Court of Appeals erred in not holding that the assessment and collection in 1929 of a deficiency in the taxpayer's tax for 1924 was illegal and void in its entirety, because made while his appeal from the determination of such deficiency was pending and undetermined before the Board of Tax Appeals and hence in direct contravention of the express prohibition of the statute.

4. The Circuit Court of Appeals erred in that, after holding that the taxpayer by depositing $36,500 with the collector to be held in a special fund without assessment waived the restriction on the assessment of that sum while his appeal was pending before the Board of Tax Appeals, it did not hold that the assessment at the same time of the additional sum of $9,135.73 and the collection thereof by distraint was an illegal and void assessment and collection

5. The Circuit Court of Appeals erred in that, after holding that the taxpayer's appeal to the Board of Tax Appeals was a nullity because not timely filed, it did not hold that the assessment and collection of the deficiency in tax in November, 1929, was illegal and void because barred by limitation when made.

IV.
ARGUMENT

Synopsis of Argument

In support of the errors assigned the petitioner asserts and relies on the following propositions which will be presented and considered in order:

1. The taxpayer was not estopped to claim a refund of tax overpaid for 1924 as the result of the erroneous inclusion in income on his return for that year of certain items of income which belonged in the year 1925 on the ground that the assessment of additional tax upon such items for 1925 was barred by limitation when he filed his claim for refund.

2. The taxpayer was entitled to have his allowance for depletion on the oil production and bonuses for leases received from his land in 1924 computed on the discovery value thereof resulting from the Hully Sands offset well, part of the cost of which he paid for the purpose of discovering oil on his land and by which he did discover oil on it.

3. The assessment and collection in 1925 of a deficiency in the taxpayer's tax for 1924 was illegal and void in its entirety because made while his appeal from the determination of such deficiency was pending before the Board of Tax Appeals, or, if his appeal to the Board was void, then because made after the assessment and collection of such deficiency was barred by limitation.

4. If by depositing $36,500 with the collector to be held in a special fund without assessment the taxpayer waived the statutory restrictions on assessment of that sum while his appeal was pending before the Board of Tax Appeals, still the assessment of the additional sum of $9,135.73 and the collection thereof by distraint was an illegal and void assessment and collection, because made while his appeal was pending before the Board, or, in

event that appeal was a nullity, then because made after the assessment and collection thereof was barred by limitation.

Proposition One.

The taxpayer was not estopped to claim a refund of tax overpaid for 1924 as the result of the erroneous inclusion in income on his return for that year of certain items of income which belonged in the year 1925 on the ground that the assessment of additional tax upon such items for 1925 was barred by limitation when he filed his claim for refund.

It is a fundamental principle of income taxation that the tax is imposed and collected with reference to a fixed period of time. A taxpayer may keep his books of account and make his income tax return on either a cash receipts and disbursements basis or an accrual basis. But there is no better settled rule in respect of income taxation than that, according to whatever method of accounting the taxpayer uses, items of income must be included on the return for the year in which they belong and items of deduction must be taken, if taken at all, in the year in which they belong, and neither taxpayer nor the Commissioner may transfer or permit the transfer of items of income or of deduction to a year in which they do not belong. Article 22 of Regulations 65.

In Paul and Mertens Law of Federal Income Taxation, Volume 1, Section 11.03, page 481, it is said:

> "The concept is fundamental that the law imposes the tax with reference to a fixed period of time. The income tax law is predicated upon annual periods; proving income for a period of years does not prove

income for any one year. The annual period is, of course, a matter of necessity if the law is to be administered; it has been called the cornerstone of our tax structure."

In *Newman* v. *Commissioner* (10th C. C. A.), 41 Fed. (2d) 743, the Court said:

"Income taxes are levied upon the basis of an annual accounting period. Rates are based upon the needs of the government for revenue and are continually changing. Annual accounting periods must be adhered to and arbitrary shifting of income from one year to another must be prevented in order to enable Congress to successfully adjust the rates to the needs of the Government. These have become fixed requirements in federal revenue taxation."

To the same effect are:

United States v. *Ludey*, 274 U. S. 295, 304.

Burnet v. *Sanford & Brooks Co.*, 282 U. S. 259.

Burnet v. *Thompson Oil & Gas Co.*, 283 U. S. 301.

Brown v. *Helvering*, 291 U. S. 193, 199.

Aluminum Casting Co. v. *Routzahn*, 282 U. S. 92.

Fawcus Machine Co. v. *United States*, 282 U. S. 375.

There is no need to multiply authorities on this for they are all one way.

In this case the evidence is undisputed that the taxpayer erroneously included on his return for 1924 the sum of $31,608.31 of an in-oil payment of $40,000 due to him from his lessee, and also the sum of $16,119.22 of oil

royalties, which he did not in fact receive until in 1925, and that the assessment of the tax involved in this action is based on the amended return made by deputy collector Sproles in which the above items are included in taxable income, notwithstanding they were not in fact income for 1924. The result of this erroneous transfer of items of income from the year in which they belong to another year is to distort income and subject the taxpayer to an erroneous tax liability in each year. Under all authority this may not be done except for some compelling reason which does not exist here.

The respondent pleads estoppel against the correction of error in the taxpayer's return for 1924 by which income belonging in 1925 was subjected to tax in 1924. It is elementary that one who relies on the defense of estoppel must plead and prove every essential element of it.

In *Van Antwerp* v. *United States* (9th C. C. A., 1937), 92 Fed. (2d) 871, the Court, after stating the rule, said:

> "These essential elements of estoppel, each of which the government must prove in this case, are set out in an authority cited in the government's brief:
>
> " 'To constitute estoppel (1) there must be false representation or wrongful misleading silence. (2) The error must originate in a statement of fact and not in an opinion or a statement of law. (3) The person claiming the benefits of estoppel must be ignorant of the true facts, and (4) be adversely affected by the acts or statements of the person against whom an estoppel is claimed.' *U. S.* v. *Scott & Sons* (C. C. A. 1), 69 Fed. (2d) 728, 732."

The following, all of which are tax cases, support this proposition and the above-cited case:

Grand Central Public Market v. *United States* (D. C., S. D., Calif.), 22 Fed. Supp. 119.

Helvering v. *Brooklyn City R. Co.* (2d C. C. A., 1934), 72 Fed. (2d) 274.

Salvage v. *Commissioner* (2d C. C. A., 1935), 76 Fed. (2d) 112.

Commissioner v. *Union Pac. R. Co.*, (2d C. C. A., 1936), 86 Fed. (2d) 637.

Hull v. *Commissioner* (4th C. C. A., 1937), 87 Fed. (2d) 260.

Crossett Lbr. Co. v. *United States* (8th C. C. A., 1937), 87 Fed. (2d) 930.

Louis Werner Saw Mill Co. v. *Helvering* (Ct. App., D. C., 1938), 96 Fed. (2d) 539.

Helvering v. *Salvage* (1936), 297 U. S. 106.

McEachern v. *Rose* (1937), 302 U. S. 56.

Cases were presented by the respondent in the court below, and will doubtless be presented to this Court, dealing with situations where the taxpayer had erroneously taken a deduction in the wrong year and then sought to take it again in another year where it properly belonged after the bar of limitation had fallen on the correction of the error in the previous year. Some of these emphasize the fact that deductions from gross income are never a matter of right, but are allowed by Congress as a matter of grace and privilege and that a taxpayer, by claiming his

privilege at the wrong time, may lose his right to have it at the right time.

In the instant case we are not dealing with deductions, but with the erroneous taxation of income in a year in which it does not belong. All authorities recognize that a taxpayer has the fundamental right and is under the imperative duty to see that his income for each period is correctly determined. Otherwise his income will be distorted and be either too high or too low in any year in which it is not correctly determined, and if items of income may be transferred from one year to another, they may be subjected to tax in a different rate bracket or under a different statute and on a different basis in the year to which they are transferred from the year in which they are properly taxable.

In this case the trial court did not find that the Commissioner or the collector was without means of ascertaining knowledge of the facts in respect of the taxpayer's return for 1924, nor that they were actually without such knowledge.

The uncontradicted evidence shows that respondent's deputy collector Sproles, and the revenue agent Hardcastle, both had knowledge of the facts within the period of limitation on the assessment of tax for 1925 (R. 111, 117). Sproles testified that he did not have recollection of Carey's statement to him in April, 1925 (142), but his testimony that he did not recollect that statement is not a denial that it was made. There was no denial of Carey's testimony that in 1928 he called revenue agent Hardcastle's

attention to the fact of the erroneous inclusion of 1925 income on the 1924 return. Again Sproles testified that he had a conversation with Carey in April, 1925, with respect to the taxpayer's 1924 return and said:

> "We had already made an examination of the Hughes County records and had information in regard to these leases and royalty items" (R. 144).

Certainly the Commissioner had the means of acquiring full knowledge in respect of every item in that return, and his deputy collector who actually made the amended return says that he had made an examination and had information in regard to those items when he prepared that return.

The authorities cited are convincing that under the facts of this case the taxpayer is not estopped to claim in this action a refund of tax based on the erroneous inclusion in 1924 income of items which belonged in another year. The fact that such items are included in income and subjected to tax in 1924 is not disputed in the evidence and is specifically found by the Court (R. 50).

We quote briefly from two of the cases last cited.

In *Hull* v. *Commissioner, supra,* an income tax case, the Court said:

> "The contention that the petitioner not having returned the payment as taxable income for the year 1925, is estopped from contending that the payment was taxable, if at all, in that year, is not a sound one.
>
> * * * * * * *
>
> "Estoppel is an affirmative defense, and the burden is upon the party asserting it to establish both the facts

necessary to support it and the fairness of its application, and a party either knowing the facts, or in a position to know them, cannot claim the benefit of estoppel. *Helvering* v. *Brooklyn City R. Co.* (C. C. A), 72 Fed. (2d) 274; Jones on Evidence (3rd Ed.), Para. 279."

In *McEachern* v. *Rose, supra,* the Court said:

"But Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpayments of taxes because of the taxpayer's failure to pay other taxes which might have been but were not assessed against him."

In the Court's opinion (R. 50) reference is made to the Form O which Carey prepared in 1928 and it is said that the 1925 items were reported therein as income for 1924 and a deduction for depletion claimed upon them. An examination of this exhibit in the record fails to sustain the Court's statement (215-217). It does not appear upon what income the depletion claimed by this Form O was based. And in any event in preparing it Carey was merely complying with the requirements of the Treasury Regulations in respect of the revaluation of property for discovery depletion and would of necessity use the income from the property as shown on the taxpayer's amended return prepared by deputy collector Sproles and likewise would of necessity use the only method of determining discovery value on the taxpayer's property which the Commissioner recognized and would permit. Only by complying with those requirements could the taxpayer receive such depletion deduction as the Commissioner was willing to allow.

His claim for a different determination of the income subject to depletion and a different discovery value on his property could be raised only by contesting the Commissioner's determination of a deficiency, first, by an appeal to the Board, which he did, and then, after that terminated without an adjudication on the merits, but by dismissal for lack of jurisdiction, and after he had been entrapped into the asserted payment of part of the alleged deficiency in tax, by filing his claim for refund and bringing this action to recover. It does not appear that there was anything in the Form O that could operate as an estoppel against the taxpayer, for it simply was his effort to obtain such deductions from the income reported on the deputy collector's amended return as the Commissioner would permit to him on the facts of that return and under the Commissioner's rules for determining discovery value.

Plainly on the undisputed facts the respondent has failed to sustain his burden of proving the essential elements of an estoppel. The fact, the nature and the extent of the error in the taxpayer's return for 1924, resulting in the imposition of tax upon purported income to him in that year which was actually received in and belonged in another year, is not disputed and is admitted. The only reason given by the Commissioner and by the courts below for denying the taxpayer a refund of such admittedly erroneously overpaid tax is that it is now too late to tax the items erroneously taxed in 1924 in the year in which they belong and in which they should properly be taxed. Under all the authorities this is not a sufficient ground for

refusing the correction of the admitted error in respect of the year 1924.

The cases cited by the court below to sustain its position are all distinguishable on the facts from this case.

Proposition Two.

The taxpayer was entitled to have his allowance for depletion on the oil production and bonuses for leases received from his land in 1924 computed on the discovery value thereof resulting from the Hully Sands offset well, part of the cost of which he paid for the purpose of discovering oil on his land and by which he did discover oil on it.

Section 214(a) (9) of the Revenue Act of 1924 provides that in computing net income there shall be allowed as a deduction in the case of oil and gas wells a reasonable allowance for depletion to be made in all cases under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary.

The pertinent part of Section 204(c) of this Act is as follows:

> "The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that *in the case of* mines, *oil and gas wells, discovered by the taxpayer,* after February 28, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, *the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter.*"

Articles 201 to 228, inclusive, of Regulations 65 deal with the determination of depletion deductions on mines and oil and gas wells. The pertinent part of these Regulations here is Article 222 which is in part as follows:

"*Discovery—Proven Tract or Lease—Value Disproportionate to Cost.*—(1) For the purpose of section 204(c) of the Revenue Act of 1924, an oil or gas well may be said to be discovered when there is either a natural exposure of oil and gas, or a drilling that discloses the actual and physical presence of oil or gas in quantities sufficient to justify commercial exploitation.

* * * * * * *

"A proven tract or lease may be a part or the whole of a proven area. A proven area for the purposes of this statute shall be presumed to be that portion of the productive sand or zone or reservoir included in a square surface area of 160 acres having as its center the mouth of a well producing oil and/or gas in commercial quantities. In other words, *a producing well shall be presumed to prove that portion of a given sand, zone, or reservoir which is included in an area of 160 acres of land, regardless of private boundaries.* The center of such square area shall be the mouth of the well, and its sides shall be parallel to the section lines established by the United States system of public-land surveys in the district in which it is located. Where a district is not covered by the United States land surveys the sides of said area shall run north and south, east and west.

"So much of a taxpayer's tract or lease as lies within an area *proven either by himself or by another* is 'a proven tract or lease' as contemplated by the statute, and the discovery of a well thereon will not entitle such taxpayer to revalue such well for the purpose of

depletion allowances, *unless the tract or lease had been acquired before it became proven.*"

The fact situation to which the cited statute and Regulations are sought to be applied may be briefly restated here. At the beginning of the year certain land of the taxpayer was unproven for oil and gas. For the purpose of testing and proving this land he contributed an offset oil and gas lease to the cost of the Hully Sands well, without which contribution it would not have been drilled. That well came in a producer on August 16, 1924, and proved his adjoining land valuable for oil and immediately rendered its oil value disproportionate to its cost, for he had no cost in its mineral value. He claims the fair market value of it at any time within thirty days after that well was brought in as discovery value to be taken as the cost basis for the determination of his depletion allowance. The Commissioner contends that under the statute and the Regulations a taxpayer cannot claim discovery value unless he drills a producing well on his own land, even though he helps pay for an offset well which proves his land for oil, and that he is excluded from ever having any discovery value on his land thus proven, even though he later actually brings in a well on it.

It will be noted that under the statute discovery value is allowed in the case of an oil well "discovered by the taxpayer" and not acquired as the result of purchase of a proven tract or lease. *The statute does not say that a taxpayer must have a well on his own land to discover oil thereon. Neither do the Regulations so say.* Nor is there any rea-

son apparent why a taxpayer, who in good faith for the purpose of discovering oil on his land expends his money or money's worth in the drilling of a well on another's land, but in such close proximity to his that if productive it will have the effect to discover oil on his land, should be denied the benefit of discovery value for his land based on such well. Without dispute he comes within the spirit of the statute and Regulations, for certainly he has, by his own effort and his own expenditure of money or money's worth for that very purpose, discovered oil on his land.

The drilling of oil wells is expensive and it is so common as to be the rule, rather than an exception, that the drilling of a well in an unproven area, that is, a wildcat well, is made the subject of joint expenditure and risk of the owners of lands and leases surrounding it which will be tested by it and proven productive if it is a producer. It is contrary to sound reasoning to say that only the owner of the land or leasehold on which the well is drilled can claim discovery value by reason of such well when others have helped to pay the cost of it for the purpose of discovering oil on their lands and leases, and through it have accomplished that purpose. Certainly one can discover oil on his land without actual production of oil from it.

The Regulations provide that a producing well is *presumed* to prove, that is, to *discover* oil upon, "a square surface area of 160 acres having as its center the mouth of a well." This being a *presumption* only, it may be overcome by evidence in any case and is so overcome here. It requires no argument to establish that such presumption is purely

arbitrary and without foundation in fact or reason. Everyone knows that oil deposits have no respect for section and quarter-section lines which mere man lays out on the surface for his convenience in describing property. There has never yet been a discovery well which in fact proved an area of 160 acres in a square form with a well in the center and no more and no less. In truth a discovery well proves an area not subject to arbitrary determination, but indefinite both in extent and in shape and variable with each well. Certainly it *discovers* oil on land to which it is an offset, according to both the dictionary and the common-usage definition of that term.

Engineer Revenue Agent Dyche, testifying for the respondent, said that it was a fact that a well would generally prove a much larger area than 160 acres, the extent and trend of it being dependent upon the geology of the area, and that, from his knowledge of the field where in 1924 the Hully Sands well came in offsetting the Ryan land, that well would prove at least the north half of Section Two, and with less certainty the involved 40 acres adjoining this tract on the south, and that in the production and operation of the Hully Sands well over a period of time it would drain oil from the Ryan land (R. 135-138).

So it is not only a matter of common knowledge, but is proven by the testimony of a competent witness, a skilled petroleum engineer long in the service of the Government (R. 128-129), that the Hully Sands well did in fact prove valuable for oil the land of the taxpayer here involved, which means that it did in fact to the ordinary understand-

ing *discover* oil on his land. Dyche's testimony as a petroleum engineer, and with at least some knowledge and experience as a petroleum geologist, is corroborated in this case by the practical views and opinions of hard-headed oil operators who paid $1,000 an acre bonus for an oil and gas lease on 80 acres of this land within two days after the Hully Sands well came in and $1,250 an acre bonus for an oil and gas lease on another 80 acres of it in 33 days after the Hully Sands well came in, and by qualified witnesses who testified without contradiction or dispute that, within 30 days after that well came in, this land had a lease bonus value of $1,250 an acre, and a royalty value of the same amount (R. 84, 88).

The Regulation quoted says that the property upon which discovery value must be established is the *well*, but defines the well as all of the proven area "to the limit of the taxpayer's private bounding lines," but not exceeding the 160 acres in a square form. This Regulation is the closest approach to a declaration that a taxpayer may not have discovery value on his property unless the well is drilled on his own land. Yet it does not expressly say so and there is no reason, and no support in the statute, for limiting the *method* by which a taxpayer may *discover* oil on his land to the drilling of a well thereon by him. The statute says that where the taxpayer's property is proven productive by oil *discovered* by the taxpayer, which means *discovered* in any manner which definitely determines that it is productive, and its value is thereby rendered disproportionate to its cost, he is entitled to have his depletion allowance computed on discovery value in lieu of cost.

The only decided case on a question similar to the one here presented is *Security First National Bank of Los Angeles* v. *Welch* (1937, C. C. A. 9th), 92 Fed. (2d) 357. The facts there were that the discovery well in the Torrance oil field was brought in in 1921. The leases on which depletion based on discovery value was claimed were sold on June 30, 1924, some three years later. The majority opinion of the Court holds that the taxpayer could not have the benefit of discovery value on his property, because it was proven productive by the discovery of oil on the land of another, even though this was immediately adjoining his. It is not clear from the fact statement whether there was a producing well offsetting the taxpayer's land. There is a very vigorous dissenting opinion in that case which states the argument of the petitioner here. But there is a vital fact distinction between that case and this one. *Here the taxpayer participated in and shared the cost of the drilling of the offset well which proved his property.* This fact ought to tilt the balance on which the above case was decided in favor of the taxpayer here.

Certainly there is no express provision in the law or regulations which requires the taxpayer to drill at his own expense a well on his own land to have the benefit of discovery value, and in sound reasoning and fundamental justice there is no reason for the adoption of an arbitrary rule which would deny him the benefit of discovery value on his land when he participates in the drilling of a well adjoining it for the purpose of discovering, and which does in fact discover, oil on his land. We respectfully ask this

Court to examine with care both the majority and the minority opinions in the cited case and then, upon consideration of the statute, the regulations and those opinions, and this Court's own views as to what should be the reasonable, fair and just interpretation of the statute, decide this question.

The Appeals Court says that a taxpayer is not entitled to a depletion allowance as a matter of right, and that provision for it is an act of grace. Authorities are cited which so hold (R. 226). With this we fully agree, but where, as here, Congress has seen fit as an act of grace to grant a depletion allowance under certain conditions, *any taxpayer who comes within those conditions is entitled to that allowance as a matter of right.* In this case the taxpayer is not seeking some privilege or benefit outside of and beyond the statute, but is contending for the claimed depletion allowance *on the ground of compliance with the very terms and conditions of the statute which grants it.*

The Commissioner has always recognized and allowed discovery value to the fee owner of land where his lessee drilled a discovery well thereon at the lessee's sole expense. This is regarded as discovery by the fee owner, although he contributed nothing to the cost of the well and had no control over the drilling of it, and if it is a producer and renders the value of his royalty right in the fee disproportionate to its cost, he may take that value in lieu of cost for the purpose of computing his depletion allowances. There is no distinction in principle between a fact situation in which a landowner gives an oil and gas lease on his land

to a lessee who at his own cost drills a well thereon in which oil is discovered, and the one in which the landowner contributes a substantial amount in value to the drilling of a well on another's land which offsets his, for in both situations the landowner, in fact and in law, discovers oil on his land and makes its value disproportionate to its cost.

Let us assume that a taxpayer owns a tract of land and also an undivided interest with one or several others in an adjoining tract and that these joint owners drill a well for oil on the tract they own offsetting the tract which he owns exclusively. If such well is a producer, it proves not only the land on which located, but under the Regulations also the adjoining land insofar as it is included in 160 acres in a square form with the well in the center. Not even the Commissioner would contend in such case that the taxpayer had not discovered oil and was not entitled to discovery value on the tract on which the well was situated to the extent of his interest therein and equally on the land which he owned exclusively within the admittedly proven area. So here if Ryan had owned an undivided interest in the fee or the leasehold on which the Hully Sands well was situated, and then, as he did, had contributed a lease on an offsetting 40 acres of his land as his share of the cost of that well, then not even the Commissioner would dispute that he had discovered oil on that part of the land he owned exclusively which was within the area proven by the Hully Sands well according to the Regulations, nor dispute that he was entitled to discovery value on his interest in each property.

The unqualified statutory right of the taxpayer to the deduction of an allowance for depletion on a bonus received for an oil and gas lease in advance of any production on the property covered by such lease is settled by the decision of this Court in *Herring* v. *Commissioner* (1934), 293 U. S. 322. Such bonus is an advance royalty. This right is equally well established regardless of whether the depletion is based on cost or discovery value or is percentage depletion. The foregoing case is supported by the following which are cited therein:

Burnet v. *Harmel*, 287 U. S. 103.

Murphy Oil Co. v. *Burnet*, 287 U. S. 299.

Bankers Coal Co. v. *Burnet*, 287 U. S. 308.

Palmer v. *Bender*, 287 U. S. 551.

The rule applies whether the sale of the lease is followed by production from the property within the taxable year or not. In this case there was production from each property leased within the taxable year (R. 217). *But the taxpayer has not been allowed a cent of depletion on the bonuses he received for those leases. Herring* v. *Commissioner, supra,* has been cited and followed many times, but it has never been modified or criticized and is controlling here and hence there is no need to present further authorities to the same effect.

The following Treasury decision and rulings of the Bureau also support the taxpayer's contention here:

T. D. 3938, C. B. V-2 117; G. C. M. 11384, C. B. XIII-1 64; I. T. 2361, C. B. VI-1 73.

The fact issue as to the amount of taxpayer's depletion allowance based on discovery value resulting from the Hully Sands well can be determined on the record as made when and if the legal question of his right to such depletion allowance is determined in his favor. Then the amount of the allowance will become a matter of re-computation.

It may be observed that the statute authorizing depletion on discovery value of an oil property passed out with the Revenue Act of 1926 which provided for percentage depletion or cost depletion without the benefit of discovery value, whichever was greater, and so the Regulations involved here do not have the sanction of the re-enactment of the same statute in the light of their provisions. Nor does it appear that there has been any settled interpretation of them as the respondent interprets them here which has met congressional approval, nor will the interpretation of them as contended for by the petitioner here disrupt or disturb the settled administration of the revenue laws by the Bureau. There is no such thing as depletion on discovery value since 1925.

Proposition Three.

The assessment and collection in 1925 of a deficiency in the taxpayer's tax for 1924 was illegal and void in its entirety because made while his appeal from the determination of such deficiency was pending before the Board of Tax Appeals, or, if his appeal to the Board was void, then because made after the assessment and collection of such deficiency was barred by limitation.

Section 274(a) of the 1926 Act provides that when the Commissioner determines a deficiency in tax he shall send a notice to the taxpayer by registered mail and the taxpayer may file a petition with the Board of Tax Appeals for redetermination of the deficiency within 60 days after the mailing of the notice, and then provides further:

> "No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final."

Section 274(a) of the 1924 Act is substantially the same as the foregoing, and Section 272(a) of the 1928 Act is identical with it.

Section 277(b) of the 1924 Act suspended the running of the statute of limitations for 60 days after the notice of deficiency was given, and, if an appeal was filed with the Board, then until the decision of the Board had become final.

Section 277(b) of the 1926 Act provided that the

statute of limitations was suspended for the period during which the Commissioner *was prohibited from making the assessment or beginning distraint* or a proceeding in court and for 60 days thereafter.

Section 504(a) of the 1928 Act provided that the running of the statute of limitations was suspended:

> "For the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court *(and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final)*, and for 60 days thereafter."

Then Section 504(b) of the same Act provided that:

> "Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act."

Section 277(a)(2) of the 1926 Act provided a limitation on the assessment of any income taxes imposed by the 1924 Act of "four years after the return was filed." This is the same limitation prescribed in Section 277(a)(1) of the 1924 Act.

The record in this case shows that plaintiff's return for 1924 was filed on March 16, 1925, March 15 being Sunday. Therefore the time within which any additional tax could be assessed against the taxpayer expired on March 16, 1929. If the taxpayer had not filed his petition and docketed the case on appeal with the Board, the assessment made by the Commissioner in November, 1929, would have been about seven months too late and would have been a void assessment because barred by limitation.

Under the provisions of the statute cited the filing of the taxpayer's petition with the Board and the docketing of a proceeding in respect of the deficiency involved, had the effect to prohibit the Commissioner from assessing the deficiency or begining distraint, and to suspend the running of the statute of limitations, while that proceeding was pending. Obviously if that proceeding did not have such effect, then under Section 504(a) of the 1928 Act it did not have the effect to suspend the running of the statute of limitations, for the suspension of the running of the statute is expressly conditioned:

> "for the period during which the Commissioner is prohibited from making the assessment or beginning distraint."

The fact that the Board ultimately determined that it had no jurisdiction, because the petition and proceeding before it was not timely filed and docketed, is of no consequence with respect to the effect of that proceeding while it was pending. Whether the proceeding was or was not timely filed and docketed and whether the Board did or did not have jurisdiction was necessarily undetermined until finally adjudicated by the Board. And the pendency of the proceeding before the Board until that time had all the effect, with respect to prohibiting the Commissioner from making an assessment or beginning distraint and to the suspension of the running of the statute of limitations, that a proceeding regular and valid in all respects would have had. This seems to be definitely established by the following cases with none to the contrary:

American Equitable Assurance Co. v. *Helvering* (C. C. A. 2d), 68 Fed. (2d) 56.

USL Battery Corporation, 32 B. T. A. 810, 812.

Puget Sound National Bank, 36 B. T. A. 386, 390.

Marie Minor Sanborn, 39 B. T. A. 721, 725.

In *USL Battery Corporation* v. *Commissioner* (2d C. C. A.), 84 Fed. (2d) 1020, certiorari denied 299 U. S. 593, the Board decision in *USL Battery Corporation, supra*, is affirmed in the following language:

> "Affirmed on authority of *American Equitable Assur. Co of New York* v. *Helvering*, 68 Fed. (2d) 144 (C. C. A. 2d)."

The court below in support of its holding on this point cites *Lewis-Hall Iron Works* v. *Blair*, 57 App. D. C. 364, 23 Fed. (2d) 972, 974; *Chambers* v. *Lucas*, 59 App. D. C. 327, 41 Fed. (2d) 299; and *Continental Petroleum Co.* v. *United States* (10th C. C. A.), 87 Fed. (2d) 91, 94. An examination of these cases shows that they do not in any respect touch the point here made by petitioner, but deal with the definition of what constitutes a *petition* before the Board and of what constitutes a *filing* before the Board. Section 504 of the 1928 Act is not considered at all in those cases nor by the court below in this case.

The assessment of tax by the Commissioner during the time prohibited by statute for making an assessment or beginning distraint is void and tax paid or collected on such assessment may be recovered for the taxpayer. The following authorities support this statement and the holding of the court below to the contrary is in direct conflict with them:

American Equitable Assur. Co. v. *Helvering, supra.*

Ventura Consolidated Oil Fields v. *Rogan* (1936, C. C. A. 9th), 86 Fed. (2d) 149, ceritorari denied 300 U. S. 672.

United States v. *Yellow Cab Co.* (C. C. A. 7th), 90 Fed. (2d) 699.

United States v. *Barber* (D. C. N. D.), 24 Fed. Supp. 229.

United States v. *Barber* (D. C. N. D.), 25 Fed. Supp. 197.

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346.

United States v. *Continental National Bank & Trust Co.*, 305 U. S. 398.

If the holding of the court below is right, then the foregoing cases are wrong, and if they are right, the holding of the court below is wrong, and as well the cases of *Van Antwerp* v. *United States* (9th C. C. A.), 92 Fed. (2d) 871, and *Lehigh Portland Cement Co.* v. *United States* (Ct. Cl.), 30 Fed. Supp. 217, 224, 233, which are cited by that Court.

If for no other reason than to resolve the conflict in those decisions, this Court should grant the petition for certiorari in this case.

And if the deficiency in tax here involved was assessed after the expiration of the period of limitation on the assessment thereof, then the amount paid on such assessment is by statute specifically made recoverable by the taxpayer. Section 607 of the Revenue Act of 1928 provides as follows:

> "Any tax (or interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the ex-

piration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

This statutory rule is recognized and applied in *Welch* v. *Schweitzer* (9th C. C. A.), 106 Fed. (2d) 885, and *McEachern* v. *Rose*, 302 U. S. 56.

If the assessment of tax by the Commissioner during the period in which he is expressly prohibited by statute from making it, is deemed merely irregular and premature, then the statute is repealed. But until this Court so holds, the taxpayer is entitled to the benefit of the statute as it stands.

Proposition Four.

If by depositing $36,500 with the collector to be held in a special fund without assessment the taxpayer waived the statutory restrictions on assessment of that sum while his appeal was pending before the Board of Tax Appeals, still the assessment of the additional sum of $9,135.73 and the collection thereof by distraint was an illegal and void assessment and collection, because made while his appeal was pending before the Board, or, in event that appeal was a nullity, then because made after the assessment and collection thereof was barred by limitation.

This proposition is in part a corollary to the preceding one. But the courts below held that the deposit of $36,500 made on October 2, 1929, by the taxpayer with the collector in reliance on the collector's express agreement that it would be held in his unidentified fund account without

application on any tax liability and without assessment of any tax until the pending case before the Board became final, constituted a waiver on the taxpayer's part of the restrictions on the Commissioner's power to assess the tax. In this those courts assume that said sum was paid to the defendant to be applied on a tax liability instead of, as it was in fact, being deposited to be held in a specified account without application on tax liability. It was contended by respondent below that as collector he had no authority to receive a deposit such as this and carry it in an unidentified fund account. Assuming, without admitting, that this is true, still the Commissioner was without right to assess a tax and appropriate this deposit in payment of a part of that tax. The collector was the Commissioner's agent and representative, not only in collecting taxes, but in receiving deposits such as that made by the taxpayer here, *or else was acting in an individual and unofficial capacity, and so would be personally liable for appropriating the fund to an unauthorized purpose.*

It is elementary law that if one deposits a sum of money with another upon particular and agreed conditions, the one receiving it may not divert and appropriate it to some purpose contrary to that for which it was received. If an agent, in excess of his authority, receives a sum upon certain stipulated conditions, his principal may not in violation of those conditions, appropriate the money to some other purpose. If the act of the agent in receiving the money is repudiated as unauthorized, the only course open to the principal is to direct the agent to return the money. And if the respondent in receiving the taxpayer's money

on deposit was acting unofficially, then the Commissioner clearly had no legal right to assess the tax and the respondent had no right to apply the deposit in payment of it. This action is against the respondent, not against the United States.

The rule is analogous to that in respect of a tender of payment which requires that a tender, if accepted at all, must be accepted as made, for the acceptor cannot take the money and graft new terms and conditions on the tender, nor apply the money for some other purpose than strictly that for which it was paid.

In *Ventura Consolidated Oil Fields* v. *Rogan* (1936, C. C. A. 9th), 86 Fed. (2d) 149, certiorari denied, 300 U. S. 672, the Commissioner tried to hold the taxpayer bound by a proposed compromise and waiver of appeal which the Commissioner had not accepted. In ruling against the Commissioner, the Court said:

> "The Commissioner may not take that portion of the proposed compromise which suits him and reject the rest. *La Compania Bilbaina De Navegacion De Bilbao* v. *Spanish-American Co.*, 146 U. S. 483, 496, 13 S. Ct., 143, 36 L. ed. 1054. If a taxpayer's waiver of restrictions is given upon a condition, the Commissioner may not take advantage of the waiver without complying with the condition. *William C. Atwater & Co.* v. *Bowers* (C. C. A.), 74 Fed. (2d) 253, 256."

But if the depositing of $36,500 was a waiver of restriction on the assessment of that amount, it could not be deemed a waiver on the assessment of the additional sum of $9,135.73 which the Commissioner made at the same

time, nor for the collection of such sum by the respondent under distraint warrant while the taxpayer's appeal was pending before the Board. In fact the Commissioner's letter to Carey under date of December, 1929, indicates that the collector's action in enforcing payment of that $9,135.73 by distraint was unauthorized, for he says:

> "Since you indicate that the Collector is endeavoring to collect the full amount of the assessment in the amount of $45,635.73, the matter is being taken up with that official" (R. 113).

Since by no possibility could the taxpayer be deemed to have waived restrictions on assessment of this $9,153.73, the assessment and the collection of that sum by distraint by the respondent was done at a time when such assessment and collection was expressly prohibited by statute, because taxpayer's appeal to the board was a proceeding docketed and pending therein in respect of such deficiency, or if the taxpayer had no appeal and proceeding docketed and pending before the board, then the assessment and collection of said sum was barred by limitation. This is established by the authorities cited under the preceding proposition, which need not be repeated here.

CONCLUSION

In conclusion the petitioner says that the decision of the Circuit Courts of Appeals in this case is in direct conflict with the decisions of other Circuit Courts of Appeals on the same matter and also with the decisions of this Court, and is in direct conflict with various applicable statutory provisions which are not referred to in its decision, and is funda-

mentally wrong in its effect of denying to petitioner a depletion allowance on his oil properties, his right to which comes within the letter and the clear import of the statute. And if it should be deemed that the amount paid by taxpayer and involved herein is no more than his just tax liability, still he has been denied the benefit of the statutory provisions which control, restrict and limit the manner, power and time for the assessment and collection of such tax by the Commissioner. Those statutory provisions may be classified as technical grounds for the relief claimed, but since Congress has enacted such provisions, all the courts, including this Court, should observe them. They are intended for orderly procedure in collecting taxes and every taxpayer is entitled to the full benefit of them for his protection. If they are to be repealed, they should be repealed by Congress and not by the courts, either by direct rejection or disregard of them or by construing them out of existence. While they stand the taxpayer has a right to be taxed according to the forms of law.

The petitioner asks that this Court grant the writ of certiorari as prayed for and review the decision of the court below.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 166

MAY RYAN, EXECUTRIX OF THE WILL AND ESTATE OF THOMAS RYAN, DECEASED, PETITIONER

v.

ACEL C. ALEXANDER, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Oklahoma (R. 48–54) is not officially reported. The opinion of the Circuit Court of Appeals (R. 219–229) is reported in 118 F. (2d) 744.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 18, 1941 (R. 229). The peti-

tion for certiorari was filed June 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is taxpayer estopped to claim a refund of taxes upon payments reported as income in his 1924 return but not received until 1925 where he did not report the true facts until after the expiration of the period of limitations with respect to the assessment of his 1925 taxes?

2. Is taxpayer entitled to depletion on bonuses received for leasing property (having no mineral value when acquired) upon which no well had yet been drilled nor oil found openly exposed?

3. Where the principal amount of taxes was paid voluntarily prior to assessment, is taxpayer entitled to a refund solely on the ground that assessment and collection of the deficiency were made during the pendency of his petition in the Board of Tax Appeals?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 13–19.

STATEMENT

The facts as found by the District Court (R. 48–53), may be summarized as follows (R. 48–53):

Thomas Ryan, the original plaintiff in this case, brought this action to recover income taxes

alleged to have been erroneously and illegally assessed and collected for the year 1924. During the pendency of the suit he died and his executrix was substituted as party plaintiff (R. 48).

Ryan's income tax returns for 1924 disclosed certain bonuses on oil and gas leases which he had treated as capital gains rather than ordinary income. Thereafter a decision of this Court established that such bonuses were subject to tax as ordinary income, and on the basis of that decision the Commissioner determined a deficiency against Ryan for 1924 (R. 49).

On December 26, 1928, after the Commissioner had determined the deficiency, a sixty-day letter was mailed as required by law. This letter was returned undelivered. A second sixty-day letter was mailed on January 15, 1929. On March 11, 1929, seventy-five days after the mailing of the first letter, the taxpayer filed with the Board of Tax Appeals his appeal from the Commissioner's determination of additional tax liability for 1924. An answer was filed by the Commissioner of Internal Revenue and the appeal was set for hearing at Oklahoma City on September 26, 1932 (R. 50–51).

After the filing of the petition but before the hearing, Tom F. Carey, taxpayer's income tax consultant, talked with a Mr. Rawdon, assistant to the Collector, concerning the payment of the deficiency, alleging that the taxpayer had stated

to him that he had the money at the time but did not know whether he would have it later, and that he would like to protect himself against subsequent assessments and the running of interest against the proposed deficiency. On October 2, 1929, the taxpayer, through his tax consultant, paid to the Collector of Internal Revenue $36,500, which was placed in the Collector's unidentified account. Accordingly, the Commissioner of Internal Revenue, having been informed of the payment, on November 23, 1929, assessed a deficiency of $36,500, the amount indicated in the deficiency letter, together with interest to and including October 2, 1929. The taxpayer was advised by the Commissioner of Internal Revenue that the assessment was being made in order to clear his records and that the taxpayer's rights would not be jeopardized before the Board of Tax Appeals. Demand was made for the interest of $9,135.73, which was paid under protest on December 10, 1929. The taxpayer took no action by a proceeding in court or otherwise to enjoin the collection of any part of the interest assessed (R. 51).

Upon the hearing before the Board of Tax Appeals in Oklahoma City on September 26, 1932, the appeal of the taxpayer was dismissed upon order of the Board (which was acquiesced in by counsel for the taxpayer) upon the ground that the Board was without jurisdiction since the appeal had not been filed within sixty days of the mailing of a

notice of deficiency to the taxpayer, as required by law (R. 51).

Subsequent to the dismissal of the taxpayer's petition to the Board of Tax Appeals, and on April 7, 1933, the taxpayer filed with the Collector of Internal Revenue a claim for refund. That claim, as amended on October 2, 1933, and on November 5, 1934 sought refund on various grounds, only three of which are still in controversy: (1) that the full amount of the deficiency determined by the Commissioner in his sixty-day deficiency letter of December 26, 1928, was refundable, since assessment and collection were forbidden while the appeal was pending before the Board of Tax Appeals; (2) that the taxpayer was entitled to a partial return of tax on account of the inclusion of $40,000 in his 1924 return, which was in fact received by him in the year 1925 and should have been reported as income for the later year; and (3) that taxpayer was entitled to discovery depletion on bonuses received in 1924 in connection with leases of certain oil lands. The Commissioner made certain adjustments not here involved and accordingly ordered a refund to a limited extent in a certificate of overassessment dated June 4, 1936, but otherwise rejected the claims (R. 51–52). Ryan then brought this suit against the Collector of Internal Revenue for the District of Oklahoma (R. 9–13).

The District Court found generally in favor of the Collector on all three grounds. Respecting

the first ground, it ruled as a matter of law that the full amount of the deficiency determined by the Commissioner in his sixty-day deficiency letter of December 26, 1928, was not refundable by reason of the pending Board proceedings at the time of assessment and collection (R. 53–54).

With respect to the second ground, the court found that items of $31,608.31 and $22,565.33 were included in Ryan's original return for 1924 and represented payments from oil runs which, to the extent of $40,000, the taxpayer alleged in his claim for refund were actually received by him in the year 1925 rather than in 1924. However, the taxpayer did not attempt to file an amended return for the year 1925 to include that portion reported in the 1924 return which he claims was actually received in the latter year, and the attention of the Commissioner of Internal Revenue was not called to this matter until the claim for refund was filed in April 1933,[1] after the statute of limitations had run against assessment of any deficiency for 1925 (R. 49–50).

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[1] Mr. Carey, the income-tax consultant, testified that in 1925 he discussed this matter with Deputy Collector Harry A. Sproles, but the conversation that he had with Sproles was of a rather casual nature. Sproles denied the conversation and said further that he had no recollection of any conversation with Carey concerning the return except the part which concerned an allowance for depletion. In making report on Form O, filed in May 1928, three years after this conversation had taken place with Sproles, this item was reported by Carey as income for the year 1924 and a deduction for depletion was claimed upon it (R. 50).

Respecting the third ground for refund, the court found long prior to 1924 the taxpayer had acquired certain land in Oklahoma for farming purposes, which had no mineral or oil value when acquired. In the months of August and September 1924, the taxpayer granted certain oil and gas leases upon that property. The first well was brought in during November of that year. The taxpayer reported this well as the discovery well in Form O, filed with the Commissioner of Internal Revenue in 1928. The discovery well on the taxpayer's land was not brought in prior to the execution of the leases, nor was the taxpayer's property proven when the leases in question were given and the bonuses therefor received. However, in this connection the taxpayer has sought to show that he contributed a valuable consideration to the cost of the drilling of a certain well on lands adjacent to his property. Thus the well was brought in on adjacent lands, not owned by the taxpayer, and the adjacent property was first proven for oil prior to any discovery well on the taxpayer's lands. The District Court therefore found that taxpayer was not entitled to discovery depletion on bonuses received for leases prior to the discovery well upon his property (R. 52–53).

The Circuit Court of Appeals affirmed the judgment of the District Court (R. 229).

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ARGUMENT

I

Petitioner does not deny that the oil payments were taxable in either 1924 or 1925. Ryan reported them in his 1924 returns, and only after the period of limitations for assessment of 1925 taxes had run, did he inform the Commissioner that the disputed payments were received in 1925 rather than in 1924. Both courts below, therefore correctly held that the taxpayer was estopped from seeking a refund for 1924 with respect to these payments.

The decision below is not in conflict with the cases cited by petitioner. Here, the taxpayer had made a misstatement of fact, and the District Court has found upon substantial evidence (R. 50) that he did not report the true facts to the Commissioner until after the statute of limitations had run. In the cases cited by petitioner, either (1) the party invoking estoppel had not shown that he was damaged (*Helvering* v. *Brooklyn City R. Co.*, 72 F. (2d) 274, 275–276 (C. C. A. 2d)); or (2) there was no representation of *fact* which was incorrect and upon which the Commissioner relied (*Crossett Lumber Co.* v. *United States*, 87 F. (2d) 930, 931 (C. C. A. 8th), and *Hull* v. *Commissioner*, 87 F. (2d) 260, 262 (C. C. A. 4th)); or (3) all the facts were available to the Commissioner before the statute of limitations

had run, and the Commissioner had merely overlooked their legal significance (*Louis Werner Saw Mill Co.* v. *Helvering,* 96 F. (2d) 539, 543 (App. D. C.); *Commissioner* v. *Union Pac. R. Co.,* 86 F. (2d) 637, 640 (C. C. A. 2d); *Hull* v. *Commissioner, supra*).

Nor is the decision below in conflict with either *Helvering* v. *Salvage,* 297 U. S. 106, or *McEachern* v. *Rose,* 302 U. S. 56. The opinion in the *Salvage* case indicates that since estoppel had not been pleaded, the question was not properly in issue and that in any event there was no "false representation of fact." 297 U. S. at 109. Similarly, the *McEachern* case did not involve any actual misstatement of fact. See also *Lofquist Realty Co.* v. *Commissioner,* 102 F. (2d) 945, 948 (C. C. A. 7th).

II

Taxpayer further claims that depletion should be allowed on bonuses which were received for leases prior to the completion of the discovery well upon the property. The basis for the claim is that an offset well upon adjacent property established the discovery value of Ryan's land. The only decision directly in point is in accord with the decision below. *Security First National Bank, Trustee* v. *Welch,* 92 F. (2d) 357 (C. C. A. 9th), certiorari denied, 303 U. S. 638.

There is no conflict, as suggested, with *Herring* v. *Commissioner,* 293 U. S. 322. That case in-

volved the 1926 Revenue Act, which by Section 204 (c) (2) substituted a flat depletion allowance of 27½ percent of the gross income from the property, wholly without reference to discovery value, recovery of investment, or value of oil. The statement in the opinion, that the existence of the well was not essential to a depletion allowance on a bonus (pp. 325–326), is thus clearly irrelevant to the present question, which concerns only the *basis* upon which an allowance should be made.

III

Taxpayer claims that the Commissioner's assessment and collection are void because they were made improperly while an appeal was pending before the Board of Tax Appeals. A conflict is asserted with numerous decisions, including *American Equitable Assur. Co.* v. *Helvering,* 68 F. (2d) 46 (C. C. A. 2d); *U S L Battery Corp.* v. *Commissioner,* 32 B. T. A. 810, affirmed 84 F. (2d) 1020 (C. C. A. 2d), on the authority of *American Equitable Assur. Co.* v. *Helvering, supra,* certiorari denied, 299 U. S. 593; *United States* v. *Yellow Cab Co.,* 90 F. (2d) 699 (C. C. A. 7th); *Ventura Consolidated Oil Fields* v. *Rogan,* 86 F. (2d) 149 (C. C. A. 9th), certiorari denied, 300 U. S. 672; *Bowers* v. *New York & Albany Co.,* 273 U. S. 346; *United States* v. *Continental Bank,* 305 U. S. 398.

None of these cases involves an express waiver of the taxpayer's right to postponement of tax assessment and collection. Here both the District Court (R. 54) and the Circuit Court of Appeals (R. 228) have found that payment of the $36,500 principal amount as a credit against the proposed additional assessment was a voluntary payment and constituted a waiver under Section 274 (d) of the Revenue Act of 1926, *infra*. Examination of the legislative history (H. Rep. No. 1, 69th Cong., 1st Sess., p. 10 (1939–1 Cum. Bull. (Part 2) 315, 322)) reveals that the purpose of the section was to allow taxpayers to pay the tax in order to stop the running of interest, without losing their right to proceed before the Board of Tax Appeals. And this is precisely what the taxpayer was seeking to accomplish in the case at bar.

Ventura Consolidated Oil Fields v. *Rogan, supra,* is the only case directly touching upon the question of waiver. But there it was held that a closing agreement which taxpayer offered did not constitute a waiver under the statute and that taxpayer did not intend it to be so treated. In these circumstances there is no conflict between the instant decision and the cases cited.

CONCLUSION

The decision of the court below is correct. There is no conflict of authority. No sufficient

reason has been shown for review and the petition should therefore be denied.

Respectfully submitted.

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JULY 1941.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 204. * * *

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that in the case of mines, oil and gas wells, discovered by the taxpayer after February 28, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter; but such depletion allowance based on discovery value shall not exceed 50 per centum of the net income (computed without allowance for depletion) from the property upon which the discovery was made, except that in no case shall the depletion allowance be less than it would be if computed without reference to discovery value.

SEC. 214. (a) In computing net income there shall be allowed as deductions:

* * * * *

(9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to

the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deduction allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

* * * * *

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined

as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner, but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

SEC. 277. * * *

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

* * * * *

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that

any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

* * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

"(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a pro-

ceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter."

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

Treasury Regulations 65, promulgated under Revenue Act of 1924:

ART. 222. DISCOVERY-PROVEN TRACT OR LEASE—VALUE DISPROPORTIONATE TO COST.—(1) For the purpose of section 204 (c) of the Revenue Act of 1924, an oil or gas well may be said to be discovered when there is either a natural exposure of oil or gas, or a drilling that discloses the actual and physical presence of oil or gas in quantities sufficient to justify commercial exploitation. Quantities sufficient to justify commercial exploitation are deemed to exist when the quantity and quality of the oil or gas so recovered from the well are such as to afford a reasonable expectation of returning at least the capital invested in such well through the sale of the oil or gas, or both, to be derived therefrom.

(2) A proven tract or lease may be a part or the whole of a proven area. A proven area for the purposes of this statute shall be presumed to be that portion of the productive sand or zone or reservoir in-

cluded in a square surface area of 160 acres having as its center the mouth of a well producing oil and/or gas in commercial quantities. In other words, a producing well shall be presumed to prove that portion of a given sand, zone, or reservoir which is included in an area of 160 acres of land, *regardless of private boundaries.* The center of such square area shall be the mouth of the well, and its sides shall be parallel to the section lines established by the United States system of public-land surveys in the district in which it is located. Where a district is not covered by the United States land surveys the sides of said area shall run north and south, east and west.

So much of a taxpayer's tract or lease as lies within an area proven either by himself or by another is "a proven tract or lease" as contemplated by the statute, and the discovery of a well thereon will not entitle such taxpayer to revalue such well for the purpose of depletion allowances, unless the tract or lease had been acquired before it became proven. And even though a well is brought in on a tract or lease not included in a proven area as heretofore defined, nevertheless it may not entitle the owner of the tract or lease in which such well is located to revaluation for depletion purposes, if such tract or lease lies within a compact area which is immediately surrounded by proven land, and the geologic structural conditions on or under the land so inclosed may reasonably warrant the belief that the oil or gas of the proven areas extends thereunder unless the tract or lease had been acquired before it became so proven. Under such circumstances the entire area is to be regarded as proven land.

(3) The "property" which may be valued after discovery is the "well." For the purposes of these sections the "well" is the drill hole, the surface necessary for the drilling and operation of the well, the oil or gas content of the particular sand, zone, or reservoir (limestone, breccia, crevice, etc.) in which the discovery was made by the drilling, and from which the production is drawn, to the limit of the taxpayer's private bounding lines, but not beyond the limits of the proven area as heretofore provided.

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